TONGUE RIVER WATER USERS' ASSOCIATION'S WRITTEN TESTIMONY IN OPPOSITION TO SB 422

February 18, 2009

Dear Members of the Senate Natural Resources Committee:

It is with gratitude for your service to Montana that I submit the following comments on behalf of the Tongue River Water Users' Association. Thank you for the opportunity to comment.

Under Long-Established Water Law, the Applicant Bears the Burden of Proving that They Will Not Adversely Affect Existing Water Rights

The Tongue River Water Users' Association opposes this SB 422. As this Bill recognizes, and as is embodied in current law, "as between appropriators, the first in time is the first in right." (*See* p. 2, line 15, § 85-2-401, MCA.) SB 422 misplaces the burden of proof and thrusts it upon existing water rights holders of record to prove that their senior water rights will be harmed. Under this bill, the burden of proving no adverse effect is placed on a person with an existing water right and whose right may be adversely affected. Under traditional and long-established water law principles, a person who seeks a new appropriation right or a change in an appropriation right bears the initial burden of proving that existing water rights will not be adversely affected.

In *IRION ET AL. v. HYDE ET AL.*, 110 Mont. 570 (1940), the Montana Supreme Court stated: "It is well settled that a subsequent appropriator attempting to justify his diversion has the burden of proving that it does not injure prior appropriators." (*Citing Donich* v. *Johnson*, 77 Mont. 229, 250 P. 963.) The Montana Supreme Court has further concluded that placing the burden of proof on the applicant is not only consistent with established case law, but it is consistent with overall general principles of law:

> Prior to adoption of the Water Use Act of 1973 and amendment of § 85-2-402, MCA, in 1985, parties objecting to the change [in appropriation right]

had the burden of demonstrating adverse impact to their water rights. *See* Hutchins, The Montana Law of Water Rights, pp. 75-76 (1958); Holmstrom Land Co. v. Newlan Creek Water District (1979), 185 Mont. 409, 435, 605 P.2d 1060, 1075; Hansen v. Larsen (1911), 44 Mont. 350, 353, 120 P. 229, 231; Lokowich v. City of Helena (1913), 46 Mont. 575, 577, 129 P. 1063, 1063. However, **the statutory scheme set forth in the Water Use Act has re-assigned this burden. The placement of the burden on the applicant also conforms to general rules regarding burdens of proof. "The initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence."** Section 26-1-401, MCA. Under the statute here, the applicant would be defeated if neither side produced evidence. Also, except as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting. Section 26-1-402, MCA. **The applicant for a change of appropriation right has the burden as to the nonexistence of adverse impact.**

In cases brought in a court of law, the plaintiff has the burden of proving their case in first instance, not the defendant. That is the basic premise underlying the long-established principle that an applicant for a water right or a change in appropriation right bears the initial burden of proof. It is a basic issue of fairness, which is embodied and recognized in § 85-2-311, MCA. If a person has an existing water right that may be harmed, the applicant must show that its new or changed appropriation will not harm existing water rights.

Furthermore, the "measurable standard" provision may prove unduly burdensome. Water systems are not static. They change over time, depending upon the year, drought conditions, snowpack, etc. More importantly, however, there was recent testimony before this committee on SB 303—the State Water Plan Bill—indicating that Montana's rivers have suffered consistent decreases in flows over the years. I believe there was testimony that river flows have decreased by about 35% over the number of years. Therefore, what is measured today, may not be consistent with what the reality

will be in the coming years. Caution must be taken in this approach in order to protect existing water rights.

Surface Waters Should Be Included in the Anti-Speculation Doctrine

Although the Tongue River Water Users' Association objects to the language in SB 422 that misplaces the burden of proof by placing it on an existing water rights holders, we nonetheless support the language in the bill on page 2, line 6, subsection (9), which includes **surface waters** in the anti-speculation doctrine. Montana's waters are far too precious to allow unrestrained speculation. Section 85-2-301(2), MCA, recognizes the importance of Montana's waters, and provides that **"only the department [of Natural Resources and Conservation] may appropriate water . . . whenever water in excess of 4,000 acre-feet a year or 5.5 cubic feet per second, for any use, is to be consumed."** The foregoing section of the SB 422 that would amend § 85-2-101, MCA and restrict speculation in large quantities of ground **and surface** water is consistent with the express language of § 85-2-301(2), MCA. It is also consistent with the overall Montana Water Use Act and Article IX, Section 3 of the Montana Constitution.

Again, I thank you for this opportunity to comment.

Sincerely,

Brenda Lindlief-Hall

Brenda Lindlief-Hall
Attorney for the
Tongue River Water Users' Association
(406) 442-3261